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IN THE

Supreme Court of The United States

UNITED STATES OF AMERICA AND
UNITED STATES DEPARTMENT OF AGRICULTURE,
Petitioners,

v.

UNITED FOODS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF *AMICUS CURIAE* OF THE COALITION OF COTTON APPAREL IMPORTERS IN SUPPORT OF RESPONDENT SEEKING AFFIRMANCE

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QUESTION PRESENTED

Whether assessments imposed pursuant to the Mushroom Promotion, Research, and Consumer Information Act of 1990, 7 U.S.C. § 6101 *et seq.*, and similar programs such as the Cotton Research and Promotion Act, as amended, 7 U.S.C. § 2101 *et seq.*, to fund advertising programs designed to support crop producers violate the First Amendment rights of crop consumers who are required to pay such assessments?

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BRIEF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37.3(a) on written consent of all parties, the Coalition of Cotton Apparel Importers ("Coalition") respectfully submits this brief *amicus curiae* in support of Respondent.[1]

INTERESTS OF THE *AMICUS CURIAE*

Amicus curiae the Coalition of Cotton Apparel Importers is an unincorporated association of apparel retailers and other importers of cotton apparel products. The Coalition's members are all statutorily required, under the auspices of a U.S. Department of Agriculture ("USDA") order pursuant to the Cotton Research and Promotion Act amendments of 1990, to pay assessments to support a program of cotton advertising, research, and promotion, 7 U.S.C. § 2101 *et seq.* (the "Cotton Promotion Program").

The Coalition has a strong interest in protecting the First Amendment rights of its members, who each pay hundreds of thousands of dollars (or more) in annual assessments under the Cotton Promotion Program. The Cotton Promotion Program, like the Mushroom Program that is the subject of this appeal, compels commodity producers and importers to fund commercial speech—namely, advertising of the generic product (cotton, or mushrooms). Like Respondent, the Coalition's members believe that such assessments amount to compelled speech, in violation of the First Amendment.

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[1] Pursuant to Rule 37.6, *amicus curiae* states that no person or entity other than the Coalition, its members, or its counsel has made any monetary contribution to the preparation or submission of this brief. Further, no counsel for Petitioner or Respondent authored this brief in whole or in part.

Moreover, while the Mushroom Program and the Cotton Promotion Program are two of many commodity advertising programs administered by USDA, the Cotton Promotion Program is unusual in its reach—it commands assessments not only from producers and importers of the commodity itself, but also from the commodity's downstream users: retailers who import cotton clothing (among their many products). Cotton product importers account for approximately one-third of the fees paid into the Cotton Promotion Program, or roughly $20 million of the Program's $60 million annual collections. *See* USDA Research & Promotion Task Force, *Report to the Secretary of Agriculture* 7 (1999).[2] Yet these entities have no interest in the promotion of cotton *per se*. As a result, they cannot be assumed to benefit from, much less agree with, the commercial speech that they are required to fund.

Accordingly, the Coalition files this brief in support of Respondent recommending affirmance of the decision of the U.S. Court of Appeals for the Sixth Circuit, which held that absent a comprehensive scheme of economic regulation pertinent to the commodity's promotion, the First Amendment precludes the exaction of such assessments. Cotton apparel importers are not the subject of the economic regulations that govern U.S. cotton production, and, the Coalition contends, cannot be required to fund speech for the benefit of those regulated producers.

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[2] Available online at <<http://www.ams.usda.gov/r&p/>>.

SUMMARY OF THE ARGUMENT

The freedom of speech secured by the First Amendment has long been recognized to encompass the freedom not to speak. *See, e.g., Miami Herald v. Tornillo*, 418 U.S. 241 (1974). Further, First Amendment protections apply not only to political speech, but also to truthful commercial speech. *See, e.g., Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557 (1980). These guiding—and limiting—principles require that the holding of *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997), which permitted the compelled funding of commercial speech in the context of comprehensive economic regulation of the tree fruit industry, be read narrowly. *Amicus curiae* contends that the U.S. Court of Appeals for the Sixth Circuit correctly did just that, holding that in the absence of comprehensive, collectivizing economic regulation, companies' First Amendment rights were violated by requiring them to fund others' commercial speech. *United Foods, Inc. v. United States*, 197 F.3d 221, 224-25 (6th Cir. 2000).

While firmly supporting affirmance of the Sixth Circuit's decision striking down the compelled speech provisions of the Mushroom Program, the Coalition respectfully urges the Court to recognize also that commodity promotion programs are in place for a wide range of industries and products. Some commodities may face more regulation than mushrooms, without achieving the level of collectivization possible in the tree fruit programs of *Wileman*. Moreover, some advertising programs sweep into their funding nets companies that are altogether outside the commodity's regulatory scheme (however comprehensive—or limited—it may be).

Amicus curiae respectfully urges the Court not only to affirm the decision below, but also to make clear that the constitutionality of compulsory commodity advertising programs can only be assessed on a case-by-case basis. If a complaining company is not directly governed by a truly comprehensive regulatory scheme, of which collective advertising is only a part, it cannot be required to speak or to pay for others to do so.

The Coalition also believes that the Solicitor General's new argument on appeal—that the Mushroom Program and others like it constitute "government" speech, immune from First Amendment scrutiny—is belied by the Secretary of Agriculture's failure to supervise and monitor the bodies allegedly speaking on his behalf. The Cotton Promotion Program's speech and activities, like those of most research and promotion programs, are essentially autonomous and outside USDA's control. Therefore, this speech should not be permitted to hide behind governmental immunities.

ARGUMENT

I. Absent Extensive Economic Regulation, Compelled Commodity Advertising Offends the First Amendment

This appeal presents the question whether companies and individuals may be required, against their will and their own assessment of their best interests, to pay for collective generic advertising of commodities in which they deal. This Court previously held that such commercial speech may be compelled in the context of a heavily regulated industry. *See Wileman*, 521 U.S. at 473. However, the United States now seeks to stretch *Wileman*'s holding beyond recognition. It would have this Court immunize *any* program compelling the funding of speech from First Amendment scrutiny, so long as the compelled speech in question is nonpolitical. The U.S.

Court of Appeals for the Sixth Circuit resisted such an expansive reading of *Wileman*, and the Coalition respectfully urges this Court to do the same.

A. The Court of Appeals Correctly Applied *Wileman* to the Mushroom Program

In common with many agricultural commodities, the fruit of California's orchards is potentially subject to a comprehensive network of federal regulations governing production, distribution, and pricing. *See Wileman*, 521 U.S. at 461, 469. The national fresh mushroom industry, on the other hand, is wholly unfettered by market regulations—but for one. Mushrooms are covered by a USDA-administered research and promotion program that extracts per-unit assessments from producers and importers to fund a program of generic mushroom advertising and promotion. *See United Foods*, 197 F.3d at 222.

For the former industry (tree fruit), collective advertising is yet another dimension of collectivizing economic regulation. For the latter (mushrooms), this compelled speech is the only applicable federal regulation. Outside the context of sweeping economic restraints, it is difficult to see compulsory advertising payments as anything other than straightforward governmental control of the payers' speech. Recognizing this, the Sixth Circuit Court of Appeals read this Court's precedents to protect mushroom producers' First Amendment rights and to invalidate the Mushroom Program.

The Sixth Circuit's holding in *United Foods*, 197 F.3d at 224-25, was based on a careful examination of the language and reasoning of this Court's opinion in *Wileman*. In that case, this Court held that California's collective tree fruit advertising program—a promotional program that complemented a wide array of marketing controls under

federal law—was subject to review as a variant of the economic regulations that "already constrained" the producers' "freedom to act independently." 521 U.S. at 469. In that context, the Court was able to sustain the requirement to fund tree fruit advertising, citing the advertising's nonpolitical nature, its non-attribution to particular producers, and the absence of restrictions on producers' other speech. *Id.* at 469-70.

The United States now seeks to divorce *Wileman*'s holding from the regulatory context on which the Court relied so heavily. So long as the content of advertising or other compelled speech is nonpolitical, the government argues in effect, Congress and USDA may impose a requirement to pay for any speech on any industry or any company in reach of the Commerce Clause, without fear of treading on the payers' First Amendment rights. *See* Petitioners' Br. 16-17 & n.9. That reading asks the Court to treat extensive portions of its own precedential opinion as irrelevant.

The Coalition believes, substantially for the reasons stated by Respondent, that the Sixth Circuit accurately and fairly applied *Wileman* to find that compulsory advertising could not be justified as a component of economic regulation in an otherwise unregulated industry. Without extensive regulatory collectivization, the mushroom advertising requirement's free speech effects cannot be justified and cannot be reconciled with the First Amendment.

B. Case-by-Case Assessment Is Critical to Evaluating the Constitutionality of Commodity Advertising Programs

The Coalition respectfully contends, however, that the jurisprudence of compelled commercial speech will remain unsettled unless the Court clarifies the proper approach for

evaluating the constitutionality of other like programs. Few commodities are as free from regulation as mushrooms; few are as directly regulated as California tree fruit. A holding that unregulated companies or an unregulated industry may not be subjected to collective advertising assessments, without more, would offer little guidance to USDA or to companies in other industries, including downstream users of commodities, who are subject to promotional assessments. Accordingly, the Coalition requests that the Court not only adopt the Sixth Circuit's focus on regulatory context, but also make clear that the constitutional significance of that regulatory context can only be determined through case-by-case analysis.

As the United States notes, numerous commodities are subject to generic advertising programs, including cotton, 7 U.S.C. § 2101 *et seq.*, potatoes, 7 U.S.C. § 2611 *et seq.*, eggs, 7 U.S.C. § 2701 *et seq.*, beef, 7 U.S.C. § 2901 *et seq.*, dairy products, 7 U.S.C. § 4501 *et seq.*, pork, 7 U.S.C. § 4801 *et seq.*, and fluid milk, 7 U.S.C. § 6401 *et seq.*, among many, many others. They vary, however, in the degree to which the industries are already constrained by comprehensive regulatory schemes. Careful, case-by-case assessments will be required to determine whether entities with First Amendment complaints are in fact subject or potentially subject to the kind of sweeping economic regulation that overcame such complaints in *Wileman*. Only case-by-case assessments can legitimately determine whether, for example, telling regulatory features such as antitrust exemptions, uniform pricing, quantity restrictions, grading specifications, pooling, and surplus purchase and disposal schemes, *Wileman*, 521 U.S. at 461, are present.

It is also particularly important to note that the question should not turn solely on the degree of regulation governing the production of the commodity itself. The better question is whether the complaining party, whose First Amendment

rights are at issue, is otherwise subject to comprehensive economic regulation that justifies the free speech burdens of collective advertising. While for many commodity programs this distinction may matter little to the result, for others it may be decisive.

The Cotton Promotion Program clearly illustrates the importance of properly framing the necessary case-by-case inquiry. Historically, raw cotton production in the United States has occurred within a complex web of federal regulations, including payments to reduce cultivated acreage, price supports, and other subsidies. *See generally,* GAO Report 95-107, *Cotton Program: Costly and Complex Government Program Needs To Be Reassessed* (1995). In recent years, the complexity and cost of these programs has pushed Congress to favor less comprehensive economic controls. *See* H.R. Rep. No. 104-462 at 40 (1996), *reprinted in* 1996 U.S.C.C.A.N. 611, 612 (describing "new era of market-oriented Federal farm policy" under later-titled Federal Agriculture Improvement and Reform Act, Pub. L. 104-127, 110 Stat. 888 (1996)).

Cotton regulations presently include the Cotton Promotion Program, as amended in 1990, which mandates assessments to fund a generic advertising, research and promotion program to "strengthen cotton's competitive position and to maintain and expand domestic and foreign markets and uses for United States cotton." 7 U.S.C. § 2101. Importantly, however, those assessments are collected not only from raw cotton producers and importers (as in the Mushroom Program), but also from certain classes of downstream cotton consumers—such as importers of cotton apparel products, including retailers and their importing

middlemen, who operate in a completely separate stream of commerce from raw cotton producers.[3]

Whether or not U.S. production of cotton is subject to regulation sufficient to meet *Wileman*'s criteria (and recent Congressional history scaling back agricultural supports suggests not), it is undisputed that such raw cotton collectivization (if any) does *not* extend to or implicate the cotton product importers. Cotton product retailers have no antitrust exemptions, uniform pricing, grading specifications, pooling, or surplus purchase and disposal schemes, *Wileman*, 521 U.S. at 461. To the contrary, apparel retailing is one of the most open and competitive businesses in the country.

Under the Cotton Promotion Program, however, product importers' First Amendment rights are impaired by compulsory cotton advertising, even though these payers have no part in the regulatory scheme governing raw cotton production. Just like the mushroom producers in *United Foods*, they are not otherwise regulated under the commodity scheme. And absent such comprehensive regulation that "already constrain[s]" their "freedom to act independently," *Wileman*, 521 U.S. at 469, infringements on product importers' First Amendment rights cannot be tolerated.

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[3] *See* 7 U.S.C. § 2116(c) (defining "cotton" for purpose of importers' assessments to include "cotton content of the products derived from...cotton"); 7 C.F.R. § 1205.335(b) (assessments on imports per "bale equivalent" in cotton products). Importers and retailers of products containing cotton (including *amicus* Coalition's members) were not brought within the Cotton Promotion Program's reach until 1990. At that time, Congress amended the Program to make the previously voluntary assessments mandatory, and, in order to boost the Program's funding, to collect them also from importers of downstream cotton products such as apparel. Those changes were implemented in a referendum process in 1991. *See* 7 U.S.C. §§ 2107(b), 2110(b).

Likewise, at least for cotton product importers, it is not possible to take refuge in the notion that generic cotton advertising "further[s] the interests of those who pay for [it]," *id.* at 462 n.3. While such advertising may increase demand for cotton products, it may very well do so at the expense of products made from other fibers, such as man-made fibers, wool, and silk, that importers and retailers also purchase for sale in stores.[4] The cotton advertising that apparel importers are forced to fund may very well reduce sales of those same importers' other (and potentially higher-value) product lines. Apparel importers are thus required to fund potentially self-injurious commercial speech for the benefit of an industry (raw cotton production) in which they do not participate.

Careful framing is therefore required to ensure, *first*, that courts undertake a case-by-case inquiry into the broader

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[4] U.S. Census Bureau aggregate trade statistics show, for example, that in each of the last two years, 1999 and 2000, imports of products principally made of man-made fiber were on a par with imports of products containing cotton. Thus, of almost 33 billion square meter equivalents of textile and apparel products imported into the United States in 2000, approximately 13 billion square meter equivalents were cotton and another 13 billion square meter equivalents were man-made fibers. U.S. Census Bureau, Foreign Trade Imports CD-ROM (Year Ending December 2000). Imports of wool, silk or non-cotton vegetable fiber (such as jute or linen) products accounted for a smaller share of total textile and apparel imports, but the net result is that products containing cotton account for less than half of the textile and apparel goods imported by companies such as those in the Coalition. *Id.* A review of apparel imports alone indicates that imports of apparel principally made of cotton account for slightly over half of total apparel imports, approximately 8 billion square meter equivalents of the just over 15 billion square meter equivalents imported in 2000. *Id.* A very substantial portion of apparel importers' products, then, are potentially adversely affected by generic cotton promotion programs.

regulatory context of each compulsory commodity advertising program, and *second*, that they look to the regulations affecting the paying company, rather than the commodity in general, when considering whether the payer's First Amendment rights are violated.

II. Government Control, a Prerequisite of Government Speech, Is Lacking Here

In its brief on the merits, the United States has introduced a legal theory not addressed by the court below: it argues now that the Mushroom Program's advertising constitutes "government speech" not susceptible to First Amendment limitations. That argument rests, however, on a flawed understanding of the government's control (or lack thereof) over commodity advertising programs.

The United States contends that the Mushroom Council, the board established by statute to administer the Mushroom Program, 7 U.S.C. §§ 6103-05, is a governmental entity for First Amendment purposes under *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 400 (1985). Citing statutory features of the Mushroom Council that are mirrored in a wide assortment of other commodity advertising programs—and focusing particularly on provisions providing for oversight and control by the Secretary of Agriculture—the government argues that any speech by the Council constitutes "government speech," not the speech of the producers and importers who are required to fund it.

At the heart of *Lebron*'s "government speech" analysis, however, is the basic notion that the speech of statutorily created bodies is attributable to the government because those bodies are controlled by the government. That simple connection is severed, however, by the evidence surrounding commodity promotion programs. Notwithstanding the *de jure* indicia of USDA control on which the government relies

so heavily, the factual record tells a very different tale—one that should give any court pause before immunizing commodity boards from First Amendment scrutiny.

Boards similar to the Mushroom Council are in place for each commodity advertising program established pursuant to a USDA order. However, USDA's oversight of those boards, and in turn the boards' oversight of the companies or entities conducting the generic advertising campaigns, is extremely limited, particularly in instances in which the law compels the board to work with a single contractor to perform all of the program's research and promotion work.

For example, under the express terms of the Cotton Research and Promotion Act, the Cotton Board is required to contract for its programs with an entity whose board of directors is composed solely of cotton producers. 7 U.S.C. § 2106(g). There exists only one such entity, Cotton Incorporated, which therefore has always been the Cotton Promotion Program's only contractor. This single-source contractor operates independently of the Cotton Board, even though to the public it may be perceived as synonymous with the Cotton Promotion Program because Cotton Incorporated's name appears on all Program advertising.

In addition, as a consequence of its single-source status, Cotton Incorporated receives almost all monies collected from producers and importers under the Program. The Cotton Board's (and through the Board, USDA's) only ability to control the actions and speech of this private contractor is through the annual process of reviewing a Program budget that is prepared by Cotton Incorporated. As a practical matter, this process is a rubber stamp; the Board has little leverage to exercise over the producer-controlled Cotton Incorporated, when by law the latter is guaranteed the continuing business of the Cotton Promotion Program. Moreover, in those rare instances in which Cotton

Incorporated's promotional expenditures have been questioned by some members of the Cotton Board, Cotton Incorporated has relied on other non-Board-controlled funds to proceed with those activities over Board member objections.[5]

Notwithstanding the statutory texts, as a *de facto* matter USDA's control over commodity boards, and the boards' control of their contractors, has come up wanting. To the extent that they function independently, free from serious official oversight, these boards and their contractors are not properly cloaked with the "government" mantle.

CONCLUSION

For the foregoing reasons, *amicus curiae* the Coalition of Cotton Apparel Importers respectfully asks this Court to affirm the judgment of the court of appeals that the Mushroom Program's compulsion of commercial speech by entities not subject to collective economic regulation violates the First Amendment.

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[5] A case in point is the Cotton Incorporated gala ball at the Metropolitan Museum of New York, which has an annual price tag of nearly half a million dollars. In 1999, in the face of criticism by Cotton Board members and others that the expense was inappropriate, Cotton Incorporated nevertheless utilized some of its own funds and proceeded to hold the event—and, therefore, to "speak" for cotton producers and importers. *See, e.g.,* Sharon Walsh, "Spending Hidden by a Cotton Curtain; Farmers' 'Promotional' Fees Used for Golf, Topless Dancing, Alcohol," *Washington Post* A1 (Nov. 25, 1998).

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